No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLANT.

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Preface.

The precise point involved in this controversy was decided by Judge Lowell in one of the most scholarly opinions available on a maritime question (*The Underwriter,* 119 Fed. 713, 759-764). Consequently, unless the law applicable to the facts of this case was altered by the Act of June 23, 1910, we respectfully submit that the libel should have been dismissed. That the law was not so altered appears conclusively from *The Francis J. O'Hara, Jr.,* 229 Fed. 312.

Statement.

We cannot better present a concrete abstract or statement of this case than to quote the opening portion of the opinion of the learned District Judge who tried the cause. Judge Dooling said:

> "Libelant furnished supplies at various times to the steamer 'South Coast' in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ships account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.
>
> "The charter in question contains the following provisions:

'Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter'.

'Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith' ". (Apostles, pp. 121-123).

Specifications of Error.

We think we cannot better specify the errors which, we respectfully submit, were committed by the learned trial Judge, than to quote from his opinion and to indicate, by the use of bold type, the source of what we conceive to be the errors which lead to the decree for the libelant. In his opinion, the learned District Judge said:

> "**While these provisions require the charterer to pay all expenses incurred in operating the vessel they do not deprive him of authority to bind the vessel therefor. Indeed they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter-party.** The Act of June 23d, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship's husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies.
>
> The only condition upon which such lien may not be created is found in the following words of the Act 'but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, agreement for sale of the vessel or for any other reason, the person ordering the supplies was without authority to bind the vessel therefor'. **But by the charter in the instant case the person ordering the supplies, that is to say, the master, was not**

> **without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor.** The case presented here is different from that of the Eureka (209 Fed. 373) because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. **The present charter** contains no such provision, but on the contrary **by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the Act above mentioned,—their remedy being against the charterer upon his agreement to hold them harmless from such liens."** (Apostles, pp. 123-124.)

The conclusions reached by Judge Lowell in *The Underwriter* (referred to in our "preface") are quite the reverse. Following a profound exposition of the history of maritime liens for supplies and repairs, Judge Lowell reflects upon the facts of his case, the principles evolved from his treatise and states his conclusions as follows (119 Fed. 759-764. The italics are our own):—

> "It remains to consider the case at bar in the light of the results already reached. Did this owner assent to the lien in the case? Did he lead the materialman to believe in his assent? Ought the materialman to have known that the owner dissented? All the circumstances by

which the lien is ordinarily created or from which it is ordinarily presumed are here present,—the foreign port, the order of the master, the absence of the owner, the need of supplies if the vessel is to navigate, the necessity of pledging the credit of the vessel if the supplies are to be procured. To this the defense is: Want of authority in the master, known to the materialman, to create the lien upon the vessel. What is meant by the Master's want of authority in a matter like this? No law ever provided baldly that the repairer of a vessel should always have a lien. My vessel lies at a wharf out of repair, and she is repaired by a mere trespasser. In general he has no lien under any system of law. The repairs must be ordered or authorized by some one in authority, and the master is ordinarily such a person either at home or abroad; that is to say, the master ordinarily has authority to license the act of repairing. If authorized by him it is no longer a trespass. If the owner has given the master express authority to contract for repairs or supplies, the owner is bound personally. If the repairs are within the scope of the authority which the maritime law attributes to the master, and that authority has not been specially limited, the owner or the charterer, that person of whom the master is agent, is personally bound to pay for the repairs. All this is a development of the ordinary law of agency. By English law it seems that the owner is bound, even if the advances for repairs, etc., are made in a domestic port. Abb. Shipp. (7th Am. Ed.), 186; Arthur v. Barton, 5 Mees. & W. 138; Johns v. Simons, 2 Q. B. 425; The Lochiel, 2 W. Rob. Adm. 45. See Speerman v. Degrave, 2 Vern. 643. The owner is bound by the act of his authorized agent, as if he had ordered the repairs himself. If the owner is actually present in the port, something more than the ordinary implied authority of the

master may be necessary to bind the owner for repairs, even if not for supplies. By a peculiarity of the maritime law the master also is bound individually, but this peculiarity need not concern us here. *Whatever be the authority ordinarily given to a master, if in the particular case he has no authority to bind his principal, and if the material man knows this want of authority, the owner or principal cannot be held.* This also is the familiar law of agency. So, if the master has no authority to permit the materialman to make the repairs, and the materialman, who makes them on the master's order, knows this want of authority, it is hard to see how he can justify his trespass. If he knows that the master is forbidden to create a debt binding upon the owner, he cannot hold the owner. If he knows that the master is forbidden to permit the creation of a lien on the ship, he cannot claim a lien. Put the case in another way: If the materialman knows that the master is forbidden to repair, even in a foreign port, it would seem that he cannot proceed against either owner or vessel. If he knows that the master is permitted to repair, but only upon the condition that the repairs are chargeable neither to the owner nor to the vessel, then, if he makes the repairs on the order of the master, and without objection, it would seem that he impliedly waives his lien upon the vessel. See Emerigon, in Hall's Maritime Loans, 89, 90. It is true that the maritime law and its codes give great power to the master. But these powers must be subject to enlargement and diminution by agreement between owner and master. In general, the latter cannot hold the former by the general rules of maritime law against an express agreement duly entered into between them, and it is hard to see how he can bind him in contravention of the agreement to a third person who has knowl-

edge of its terms. We need not here discuss the statutory lien. The terms of the statute may expressly give to the master authority to create a lien, whether the owner authorizes it or not. See The Kate, 164 U. S. 458, 470; The S. M. Whipple (D. C.) 14 Fed. 354.

The mere fact that a vessel is known to be under charter does not deprive of his lien one who, in a foreign port, furnishes it with supplies on the order of the master. The George Dumois, 15 C. C. A. 675, 68 Fed. 926; The Philadelphia, 21 C. C. A. 501, 75 Fed. 684. *But if a charter or other contract limits the authority of the master in the matter of buying coal, and forbids him to buy it except upon the personal credit of the charterers only (and perhaps on his own personal credit) and if the libelant has notice of this limitation, it would seem that the lien either does not arise or is impliedly waived.* In The Kate, 164 U. S. 458, Mr. Justice Harlan said: (Here follows a quotation from the cited case).

The learned Justice also quoted from an opinion rendered by Judge Sprague in this court in The Sarah Starr, 1 Spr. 453, 455, Fed. Cas. No. 12,354, where it was said: (Here follows quotation subsequently appearing in our brief).

See The Columbus, 5 Sawy. 487, Fed. Cas. No. 3,044; Swift v. The Albus, Fed. Cas. No. 13,694; The S. M. Whipple (D. C.) 14 Fed. 354; The Alvira (D. C.) 63 Fed. 144.

In the Bombay (C. C.) 38 Fed. 863; Id. (D. C.) 38 Fed. 512 it is not stated if the libelants knew that the vessel was under charter, and it is said expressly that they had no notice of its provisions. By the French law it seems that the vessel is not bound for supplies ordered by the charterer unless the supplies are needed for the ship, apart from the special needs of the

charterer, and unless the owner, if present, would have ordered them. Desj. I, 256.

One argument in support of the Master's authority to bind the vessel, even when expressly forbidden to do so, should not be overlooked. Suppose the charter provides that the owner shall pay the wages of the crew. To put this charge upon the charterer is not uncommon. Suppose the crew to have knowledge that the charter forbids the charterer to create a lien for wages, it may be asked if the crew would lose their lien. In the case put they would have that knowledge of the master's limitation of authority which the materialmen are held to have had in the case at bar. Why should they fare any better? It is probable that the seamen's lien on the vessel would exist even in the case put,—that is to say, even though they knew that the master, in permitting it to arise, was guilty of bad faith. The seamen would be protected, however, not by the logical result of admitted principles of general law, but by reason of the favor shown to them in a court of admiralty. The wages of seamen are secured upon the vessel in many jurisdictions by a statute which admits of no exception. *Taking it as established, then, that the vessel is not bound even for necessary supplies furnished in a foreign port on the master's order, provided the materialman knows that the master is forbidden to create a lien for the purpose,* we next consider if the master's authority was so limited in this case. The limitation here contended for by the claimant is found in the charter party, whose material parts are as follows:

(2) The owner shall provide and pay for all the provisions, water, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew of said tug; shall pay for the insurance of the same; also

for all ship, cabin, engineroom, and deck stores; and maintain said tugs in a thoroughly efficient state in hull and machinery for and during the service, and including the necessary hawsers and lines for mooring and towing.

(3) The charterer shall provide and pay for all the coals, port charges, pilotages, agencies, and commissions, and all other charges whatsoever, except those before stated, and shall likewise, in case the owner deems it necessary to insure said tugs, or any of them, against war risks, pay the additional cost of the premium for such insurance.

The charterer shall accept and pay for all coals in the tugs' bunkers on delivery, and the owner shall, on the expiration of this charter party, pay for all coal left in the bunkers, each at the current market prices at the port of Boston when said tugs are delivered to them.

(6) The captains of said tugs, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, and the charterer hereby agrees to indemnity the owner from all consequences or liabilities that may arise from any irregularities in ship's papers, or from the captains signing bills of lading, or otherwise complying with the charterer's directions.

The court has to consider if this language is (1) a limitation on the authority of the captain, or (2) merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter. The language of the clauses might not unreasonably bear either construction. On general principles there is much to be said in support of the contention that a clause in a charter like that above quoted, providing that the char-

terer shall supply the vessel with coal, is intended merely as a contract between charterer and owner, and does not limit the general authority of the master to order coal for the vessel upon the vessel's credit in a foreign port. In The Kate, above cited, the provisions of the charter were much like those in this case, and the supreme court said at page 465, 164 U. S. page 138, 17 Sup. Ct. and page 512, 41 L. Ed. (Here follows quotation subsequently appearing in our brief).

There was a like charter in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and the court said at page 270, 165 U. S. page 325, 17 Sup. Ct., and page 710, 41 L. Ed.:

'Although the libelants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed, upon the facts certified, that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libelants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters, or in reference to the solvency or credit of that company.'

See Beinecke v. The Secret (D. C.) 3 Fed. 665, quoted with approval by the supreme court in the last named case; The Cumberland (D. C.) 30 Fed. 449, 455; The William Cook (D. C.) 12 Fed. 919; Neill v. The Francis (D. C.) 21 Fed. 921; The Solveig, 43 C. C. A. 250, 103 Fed. 322; The Stroma (D. C.) 41 Fed. 599; The Pirate (D. C.) 32 Fed. 486.

In other cases it was assumed that, if the materialman had had knowledge of the existence of a charter like that in this case, he would have had no lien, although as no knowledge on his part was established, the lien was allowed. The North Pacific, 40 C. C. A. 510, 100 Fed. 490; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 57 Fed. 224; The Ellen Holgate (D. C.) 30 Fed. 125. These cases construe the language used in this charter to forbid the master to pledge the credit of the vessel for the supplies he orders. Many of these cases, and others heretofore cited, also hold that the materialman is affected by the limitations of the charter if he has notice of them. There is much authority for the proposition that this charter, if brought to the notice of the materialman, will prevent him from getting a lien. It is true that there is authority upon the other side, and that the opinions of the supreme court just cited are not quite explicit. In the City of New York, Fed. Cas. No. 2,758, the lien was upheld in the case of a charter like this. The vessel was in a really distant port, however, and was in such peril that the limitation imposed on the master's authority by the charter may have been treated as inapplicable within the intent of the parties. The opinion is short. See The Wm. Cook (D. C.) 12 Fed. 919, 920. In The Lucia B. Ives, Fed. Cas. No. 8,590, the lien was upheld, but whether in reliance on the express terms of the statute or upon a doubt as to the meaning of the charter is not clear. In The Monsoon, Fed. Cas. No. 9,716, decided by Judge Sprague, in which that distinguished Judge upheld a lien upon a chartered vessel, it is doubtful if the decision was rested upon a supposed inability of the owner to limit the master's authority, or upon a construction of the charter in question. If the former, the case stands substantially alone; if the latter, it is opposed to the great weight of authority. See

The H. B. Foster, 3 Ware. 165, Fed. Cas. No. 6,291; Rozo v. The Neversink, Fed. Cas. No. 12,079; The India (D. C.) 14 Fed. 476; Id. (C. C.) 16 Fed. 262. The language of some of the opinions last cited is not clear, but the learned Judges who delivered them did not mean to hold that a materialman could claim a lien for supplies furnished a vessel where he knew that the person ordering the supplies was expressly forbidden to permit the vessel to become bound for them.

That a chartered vessel is ordinarily bound for the price of supplies ordered for her use in a foreign port by the master was expressly decided in this circuit in the case of The Philadelphia, and this is the law where the charter is silent upon the subject. *Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, where it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists.*"

Brief of the Argument.

The points which we urge are these.

I.

The terms of a charter-party or agreement for the sale of a vessel are NOT, as Judge Dooling suggests they are, the exclusive source of a charterer's inability to create liens upon the vessel.

II.

By the terms of the charter-party in the instant case, and by virtue of the notice which the trial judge found was given libelant, the charterer and his masters and his agent, Mr. Mills (Apostles p. 27) were without au-

thority to bind the vessel for the supplies ordered by them, respectively.

III.

The charter-party by requiring the charterer to hold the owner harmless from liens upon the vessel, does **NOT**, as Judge Dooling suggests it does, concede to the charterer the authority to bind the vessel for the supplies furnished by libelant.

IV.

Even if it could be held that the terms of the charter-party when read literally, fail to deprive the charterer of authority to bind the vessel, yet the terms upon which the vessel was in fact held, as evidenced by Mr. Sooy's letter to Mills, the charterer's agent, and his acquiescence, and the acquiescence of the charterer, himself, therein, deprived the charterer of authority to bind the vessel; particularly in view of the fact that a charter-party may be oral, and the further fact that the libelant was notified that the vessel was under charter and would not be liable.

I.

THE TERMS OF A CHARTER-PARTY OR AGREEMENT FOR THE SALE OF A VESSEL ARE NOT, AS JUDGE DOOLING SUGGESTS THEY ARE, THE EXCLUSIVE SOURCE OF A CHARTERER'S INABILITY TO CREATE LIENS UPON THE VESSEL.

The statute (Act of June 23, 1910) specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that *for any reason,* the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case, had been warned that the owner and the charterer

had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner (Apostles 72), the charterer (Apostles 36-37) and the charterer's agent (Apostles 95, 97). As the trial court found:—

> "So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given."

The merchant did not depend upon what the learned trial Judge found to be a defect in the charter-party; because the merchant never saw the charter-party or requested to see it (Apostles pp. 44-45). All he knew was what he had been told by the owner, the charterer and the charterer's agent; viz, that the charterer and not the vessel would be liable for the provisions.

The learned Judge failed, we respectfully submit, to accord the necessary or for that matter, any consideration to the words *"or for any other reason"* found in the statute.

The statute specifically provides that a furnisher of supplies shall have no lien if he knew or by the exercise of reasonable diligence could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor; because:—

(a) "of the terms of a charter-party",
(b) of the terms of an "agreement for sale of the vessel, or"
(c) "for any other reason".

(Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, Sec. 7787.)

Notwithstanding the words *"or for any other reason"*, appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party. This is obvious from the following excerpt from the court's opinion:—

> "And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor."

In our assignment of errors, we specified particularly that the court erred in this interpretation of the statute.

We submit that the effect of the interpretation is to eliminate from the operation of the statute, cases which the Congress, by the use of definite words, included in the operation of the statute. We will proceed now to notice some of those cases:

We have already referred at length to *The Underwriter.*

In *The Valencia,* 165 U. S. 264, it was held:

> "A maritime lien on a vessel is not created by supplying coal to it on the order of a charterer,

> without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible."

What does one see when he reflects the light of that decision upon the facts of the present case? In each, the charterer was required to pay for the supplies. In each, the charter-party failed to specifically provide that the charterer should have no power to permit liens to attach. In each, the merchant knew the owners. In each, the merchant could have discovered the precise terms of the charter-party (in fact the merchant was informed of them in the instant case). In each, the merchant looked to the vessel.

There is, of course, this difference in the two cases. In *The Valencia,* the supplies were ordered by the charterer himself, whereas in the instant case the supplies were ordered by the master (except in the case of the items aggregating $361.38, evidenced by libelant's "Exhibit 6", which were ordered by Mr. Mills (Apostles pp. 26-27) the charterer's agent (Apostles p. 96).

But this difference does not affect the point which we now urge; namely, that specific provisions in the charter-party, forbidding the charterer to bind the vessel, are not the exclusive criteria; that even

though a charter-party be silent upon the subject of liens, yet a charterer can not bind the vessel for goods ordered by him if the charter-party required him to furnish the supplies, and the furnisher had notice thereof.

Thus we have found one illustration of the *"any other reason"* which the Congress had in mind and which, we respectfully submit, the learned District Judge ignored.

And in this connection has there not been a breach of a well recognized canon of statutory construction? It would seem so from a consideration of the decision of Judge Dooling, himself, wherein, in interpreting the Act of 1910, he said in *The Sinaloa,* 209 Fed. 287, 288:—

> "The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. *The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty."*

A similar conclusion follows a consideration of the Act of 1910 in *The Dredge A.,* 217 Fed. 617, 628-9, in which the court said:—

> "This is in accordance with well settled canons of statutory construction by which courts are guided in ascertaining the intention of the legislature. 'The presumption is that the legislature does not intend to change or modify the

law beyond what it declares in express terms, or by unmistakable implication'. 26 Am. & Eng. Enc. 649.

Mr. Justice Strong in Shaw v. Railroad Company, 101 U. S. 557, says:

'No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express.' "

In *The Yankee,* 233 Fed. 919, 925-6, the Circuit Court of Appeals for the Third Circuit said:—

"But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor.' *This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him

> on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

Beyond the error which we submit resulted from a failure to so interpret the statute that no change should be deemed to have been worked except the change expressly declared, it seems to us that the interpretation placed upon the statute by the learned trial Judge is peculiarly unwarranted, in view of the fact that his interpretation unnecessarily *extends* a class of liens which are disesteemed because of their secret nature.

In *Pratt v. Reed,* 19 How. 359, 361, it was said:

> "These maritime liens in the coasting business and in the business upon the lakes and rivers are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law in this respect will tend to perplex and embarrass business, rather than furnish facilities to carry it forward."

Mr. Justice Bradley in delivering the opinion of the court in *The Lottawanna,* 21 Wall. 558, said:—

> "It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages."

Judge Sanborn in *The Aurora,* 194 Fed. 559, said:

> "A maritime lien is a privileged one, secret in character overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris,* and must be shown to exist".

Judge Hale in *The James T. Furber,* 157 Fed. 126, 129, said:

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference."

See also:—

The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607, 608;
The Dredge A., 217 Fed. 617, 629;
Taylor v. Weir, 110 Fed. 1005;
The Havana, 87 Fed. 487, 488.

Besides the character of cases indicated by *The Underwriter* (supra) and *The Valencia* (supra), there are many others which fall within the description "for any other reason", adopted by the Congress in the Act of 1910, and in which it must be held under the rules of statutory construction, the Congress intended no lien could attach to a ship for supplies furnished to it. One of these is the case in which there is BAD FAITH on the part of the furnisher of the supplies. Such a case is *The Kate,* 164 U. S. 463, in which it is said (pp. 463-465, 471):—

"We are of opinion that, as the libelant knew, or under the circumstances, is to be charged with knowledge, that the charter party under which The Kate was operated, obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libelant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libelant by the exercise of due diligence on its part. Under the circumstances, the libelant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in *bad faith* to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as 'the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners as with a view to the convenience of the commercial world'. The Aurora, 1 Wheat 96, 101. 'The vessel must get on,' and 'the necessities of commerce require that when remote from the owner, he (the master) should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will

not be able to pursue his owner's interests'. The St. Jago de Cuba, 9 Wheat, 409, 416; The J. E. Rumbell, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. *But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a charterer, when the libelant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.*

There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. *These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel.* As they throw light upon the present inquiry, it is proper to refer to some of them.

In Thomas v. Osborn, 19 How. 22, 31, 32, the court said that all the commentators agree 'that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19, Emerigon, Contrat a la Grope, chap. 4, Sec. 8, and the older commentators cited by him. Boulay-Paty, Cours de Droit Com. tit. 1, Sec. 2; Boulay-Paty, Cours de Droit Com. tit. 4, Sec. 14; and see the authorities cited by him in note 1, page 153 * * * 'If,' the court said, 'the master has funds of his

own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And *if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel'*. In the same case it was said: 'We are of opinion Loring & Co. (merchants who had given a credit to Leach, to whom had been committed the entire possession, command, and navigation of the vessel) had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances'.

In The Grapeshot v. Wallerstein, 9 Wall. 129, 136, the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: 'They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing (of supplies and materials) was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was un-

necessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts'.

So, in Hazlehurst v. The Lulu, 10 Wall. 192, 201-204, the court said: 'Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel for such a claim (for advances to the master, or for repairs or supplies furnished at his request) but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libelant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.' Again: 'Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the

ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.'

In The Emily Souder v. Prichard, 17 Wall. 666, 671, the court said that the presumption of law in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, 'can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry'.

In The Sarah Starr, 1 Sprague, 453, 455, the court said that 'in giving credit to the vessel and owners, the materialman should act in good faith, and he would not be deemed to act in good faith if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him which would create suspicion and put him upon inquiry, when such inquiry would have lead to the knowledge that the master had funds, and had no right. therefore, to obtain supplies on credit. That

is, if the materialman had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have lead to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the materialman had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created'.

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required and he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent

> the owner in the business of the vessel, but who, as the claimant knew or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.
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> * * * * * *
>
> *If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter party, but charged it only with knowledge of the facts that the vessel was being operated under a charter party, a different question would be presented.''*

The part which the decision in *The Kate* (supra), plays in the solution of the present problem cannot be better illustrated than by the following observations concerning the Act of 1910, found in the opinion in *The Oceana,* 233 Fed. 139, 146:

> "The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their power, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his

> mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. *The phrase 'knew or by the exercise of reasonable diligence could have ascertained' was adopted from The Kate, 164 U. S. 170, and was used in the Act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost."*

See, also, *The Yankee,* 233 Fed. 919, 925-6.

Thus, we submit, that far from having altered the rule laid down in *The Underwriter* (supra), the Congress specifically recognized that rule and declared it to be an accurate statement of the law, by adopting the language of *The Kate* (supra); language upon which Judge Lowell largely based his conclusion in *The Underwriter.*

Returning, for a moment, to another illustration of the "bad faith" doctrine, we find the decision of Judge De Haven in *The H. C. Grady,* 87 Fed. 232, 233 et seq., where it is said:

> "I think it sufficiently appears from the evidence that, under the agreement, the legal title of the steamer was not to be transferred until the payment of the balance due upon the contract of purchase; and it was also agreed that the purchasers were, at their own expense, to make such repairs and changes in the construction and equipment of the steamer as they might deem necessary, and were to permit no liens to be filed against her while in their possession,

and prior to the time when they should make final payment on account of the purchase price, and Messrs. Crocker & Brooks subsequently gave to said Strong a bond to secure performance of their agreement in this respect. Strong was a resident of Portland, Or., and, prior to her delivery to the purchasers under this agreement, the steamer was duly registered in the office of the collector of customs for that district, by the said Strong, as owner; and one James E. Denny was appointed by him as her master, *and he was instructed by Strong, in effect, to look after his interests, and see that no bills were incurred against the steamer until she was fully paid for.* Denny was also the agent of Crocker & Brooks, and acted for them in the negotiation concerning the purchase and delivery of the steamer. After Strong parted with her possession, under the agreement above stated, the steamer was brought to this state, and from the time of her arrival here until some time in September, 1897, was employed by Crocker & Brooks and others, who seem to have made some agreement with them for interests in the steamer, in carrying passengers and freight between San Francisco and different places on the Sacramento river; and, during the time while she was thus in the possession of Crocker & Brooks, supplies were furnished to the steamer by certain of the libelants; and materials furnished for her use, and repairs made upon her, and services rendered on board, by other libelants.

1. In my opinion, the contract between the intervenor, Strong, and Crocker & Brooks, and under which possession of the steamer was delivered to the latter, was a conditional sale.

* * * * * *

2. The libels of the Black Diamond Coal-Mining Company, Meyer & Akmann, H. P. Christie, and C. J. Sbarbaro may be consid-

ered together. That of H. P. Christie is for materials furnished and used by him in making certain repairs upon the steamer, and for labor performed by him in making such repairs. The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that, under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the state where she belongs, and where her owner resides.

* * * * * *

There was nothing, in the facts or circumstances under which the master contracted with

either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * * *

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under the contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession,

and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; *and if after its execution their claim therefor must be held to be subordinate* to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals of the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

In *The Mary A. Tryon,* 93 Fed. 220, 221, Judge Brown said:

> "*It is against conscience* that in a business like this towages for the charterer's account, when the tower knows that the boats are chartered, should be imposed upon the owner without a previous understanding to that effect. Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towages, as well as Quigly's testimony to the ordinary practice to collect of the charterers only, and the libelant's dealing with Scott alone and not with any master of the boat, are sufficient to prevent the libelant's recovery. The case is similar in principle to that of The Kate, 164 U. S. 458, where it was held that no lien would exist merely upon dealings with the charterer, even if the credit were given to both the charterer and to the vessel, because the charterer had no authority to bind the vessel. In this regard I do not think towages in the usual course of the charterer's business, and not arising in any exceptional emergency, stand in any better position than repairs and supplies. The same rule was reaffirmed still more pointedly in The Valencia, 165 U. S. 264, where the supply men had no express knowledge of any charter but had knowledge of facts sufficient to put them on inquiry."

In *The City of Milford,* 199 Federal Reporter, 956, 959-60, it was said:

> "The general purpose of this enactment is plain. Hereafter when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he

visably has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say:

'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth, but I did not do so.'

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, or agreement for sale of the vessel or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the fur-

nisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of the vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit.

* * * * * *

It is neither necessary nor appropriate to attempt to suggest what circumstances will be sufficient to put a supply man upon inquiry. In this case it is not contended that there were any. Moreover, the agent of the claimant was on the vessel, knew that all these supplies were being furnished to it, himself ordered an appreciable portion of them, and did nothing to warn those who were supplying them that the ship was not to be bound for them."

Is there any distinction between the instant case and the authorities we have cited? We submit that Rudbach did not act in good faith when he decided in his own mind that he would hold the ship for supplies which he had been told he would need sell, if at all, upon the credit of the charterers. He was not compelled to sell his goods. He did sell them, and for some he was paid by the charterer. He has a claim against the

charterer for the balance. He has no just claim against the ship. He was warned before he parted with any of his goods. After failing to collect from the charterer, he is acting in bad faith in attempting to hold the ship.

In presenting our second point, we shall refer the court to additional authorities in support of the proposition that the terms of a charter-party are *not* the exclusive source of a charterer's inability to create liens upon the vessel.

II.

BY THE TERMS OF THE CHARTER-PARTY IN THE INSTANT CASE, AND BY VIRTUE OF THE NOTICE WHICH THE TRIAL JUDGE FOUND WAS GIVEN LIBELANT, THE CHARTERER AND HIS MASTERS AND HIS AGENT, MR. MILLS (Apostles, p. 27), WERE WITHOUT AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES ORDERED BY THEM RESPECTIVELY.

This conclusion follows from the construction which the parties themselves put upon the contract, and from the fact that they promptly notified the libelant of that construction, and from the fact that the libelant never saw or sought to see the charter-party and had no knowledge of its terms, except the knowledge acquired from the statements made to him by the owner, the charterer and his agent.

This conclusion follows furthermore from a consideration of the law as it stood when the statute was enacted. The law then declared that if a

charterer be required to provision the ship, and the materialman knows or ought to know that fact, then the ship shall not be liable. As Judge Brown said in *The Sarah Cullen,* 45 Fed. 511, notice that a charterer was to pay for services is "equivalent to notice that the vessel was not to pay it". The Congress did not alter this law. It merely required the materialman to be protected if innocent; but if notified, it required him to pursue that notice, perhaps to call for the charter-party and to determine therefrom whether the owner or charterer was required to furnish the supplies. The law never contemplated that there should be used the precise words "the charterer cannot bind the ship". That conclusion resulted as a fact from the circumstance that the charterer agreed by the charter-party to pay the bills.

That is the precise conclusion which Judge Lowell reached in *The Underwriter* (supra) when he decided that the language used in the charter-party constituted "a limitation on the authority of the captain" *and not* "merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter".

And the same conclusion was reached by Judge Morton when in 1915, he decided that a materialman occupying even a more favorable position than that occupied by Rudbach in this case, was not entitled to a lien (*The Francis J. O'Hara, Jr.*

229 Fed. 312). In the present case the materialman was warned. In the *O'Hara* case he was bound by facts which he would have known if he had made inquiry. We quote from the opinion as follows:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.
>
> The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-

half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like The City of Milford (D. C.), 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company led them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford (D. C.) ubi supra, 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

The conclusion reached in these two cases (*The Underwriter* and *The Francis J. O'Hara Jr.),* the one decided before the statute of 1910, the other after, indicates fairly, we submit, that if a charterer be bound to furnish supplies to the ship and that that fact be known, actually or constructively, to a materialman, then the ship shall not be subject to a lien for the supplies, even though the charter-party did not in precise words provide "the charterer cannot bind the ship".

This proposition would seem particularly to follow, if one apply the rule announced in *The Surprise,* that even though the charter-party be silent upon the point, the charterer must provide supplies for the chartered vessel and *protect her from liens.* The court there said (129 Fed. 873, 877-8):

> "We should also observe that much has been made of the fact that in The Kate and The Valencia, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in The Kate and The Valencia. The charter (charterer) is bound to disburse the vessel and *protect her from liens,* and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party

> or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter or only an oral one without any express statement of the terms thereof."

However, in considering the effect of the decision in *The Surprise,* it is but fair to bear in mind that the supplies considered therein were "hand to mouth necessities". This appears at once from *The New Brunswick,* 129 Fed. 893, where the court said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904) 129, Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, hand to mouth supplies were furnished at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered.."

In *The J. Doherty,* 207 Fed. 997, the court considered the power of one who had rendered a towage service to a vessel which he knew to be under charter, to assert a lien upon the vessel. After

deciding that the towage was not a necessary within the meaning of the act, the court proceeded to state (p. 1001):

> "In short, for towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat. Whether such presumption arises, or whether the lien exists, depends upon the circumstances under which the services are rendered. If it appear that the services were not rendered upon the credit of the boat, or *that the surrounding circumstances were such as to apprise the tower that they were not to be so rendered, then no lien exists.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264.
>
> In the light of these principles, the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the *charterer is bound to disburse the vessel and to protect her from liens.* Moreover, so far as knowledge of the charter party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873, 64 C. C. A. 309. *It is quite possible that the libellant believed that it had a lien, no matter who was relied upon to pay. But this was not*

giving credit to the vessel. The Samuel Marshall, 54 Fed. 398, 4 C. C. A. 385. *Nor was its method of charging the items.* McCaldin v. The Stroma, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk Oliver as to the usual practice of collecting from charterers are sufficient to prevent a recovery by the libelant." (Citing cases.)

Finally, upon this point we submit the following proposition and authorities therefor:

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer, cannot constitute the basis of a lien, if the vessel were held under a charter-party which required the charterer to furnish the supplies and the furnisher knew the facts or by the exercise of reasonable diligence could have ascertained them. And this is so even though the supplies were furnished at the instance of the master.

The Columbus, 5 Sawy. 487; Fed. Cas. 3044;

The William Cook, 12 Fed. 919;

The S. M. Whipple, 14 Fed. 354;

The Ellen Holgate, 30 Fed. 125;

The Cumberland, 30 Fed. 449;

The Sarah Cullen, 45 Fed. 511;

The Samuel Marshall, 49 Fed. 754;

The Burton, 84 Fed. 998, 999;

The Tillie A., 84 Fed. 684, 685;

The H. C. Grady, 87 Fed. 232;

The Algonquin, 88 Fed. 318, 319;

The North Pacific, 100 Fed. 490;
The Underwriter, 119 Fed. 713;
The O. H. Vessels, 183 Fed. 561, 562-3;
The City of Milford, 199 Fed. 956, 959-960;
The J. Doherty, 207 Fed. 997, 1001;
The Francis J. O'Hara Jr., 229 Fed. 312;
The Kate, 164 U. S. 458.

This brings us to our third proposition.

III.

THE CHARTER-PARTY BY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM LIENS UPON THE VESSEL, DOES NOT, AS JUDGE DOOLING SUGGESTS IT DOES, CONCEDE TO THE CHARTERER THE AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT.

Obviously, this requirement was inserted in the charter-party to protect the owner, not a stranger. Particularly not a stranger who, like Rudbach, never *saw* the charter-party or in anywise depended upon it. It seems to us perfectly patent that the requirement was inserted as a result of the fact that the owner demanded protection against a stranger; a stranger, such as the one in this case, who, in bad faith, might seek a lien upon the vessel.

The precise point was considered and decided by the Circuit Court of Appeals of the Seventh Circuit in *Northwestern Fuel Co. v. Dunkley-Williams Co.,* 174 Fed. 121, and in that case the court said (p. 124):

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem without merit. Appellee was entitled under the agreement to receive the Poteskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of the appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: Paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter party."

And upon the trial of the cause, the District Judge said (pp. 126, 127):

"A persuasive argument is made by libelant as to the construction and effect of the peculiar clause in the charter-party—'and shall not permit her to be in debt for amounts constituting a lien upon her for more than the sum of one thousand dollars at any time.' It is contended that if the libelant, being put upon inquiry, had examined the charter-party, he would have been justified in construing this clause forbidding the charterer to incur liens exceeding $1000 in amount as an implied consent to liens up to that amount, and that, as there is no evidence that any liens had accrued up to the time this coal was furnished,

> it could not be held a fraud upon the owners to rely upon the security of the vessel within the limits thus fixed by the owners. This argument is specious, but not sound. The clause in question was inserted for the protection of the owner as against the charterer. It required the payment of claims by the charterer before they exceeded the limit. It is calculated to enforce the duty imposed by the antecedent clause. It was not inserted for the benefit of third parties as a foundation of a claim upon the vessel. The real question for the furnisher to determine primarily was who was bound to pay the coal bills. This question is effectually set at rest by the language of the seventh article of the charter-party: 'That for and during the life of this charter-party, the said party of the second part (the charterer) shall promptly pay all of the running and operating expenses of said steamer'. On learning of this obligation on the part of the charterer, the duty of the libelant was plainly to deal with the charterer, and by that course only could it keep faith with the owners."

In *The Surprise* (supra) the court indicates that the way in which an owner should protect himself against a lien is the very way which the trial judge held in this case results in subjecting the ship to the lien. In *The Surprise* the court said (p. 880):

> "If, in these respects, there is any violation of any agreement, express or implied, between owners and charterers, the owners must protect themselves, as was done in the case at bar, by taking an obligation with a surety, or by terminating the charter for a breach of the terms thereof."

In *The City of Milford,* 199 Fed. 956, the charterer was required, as in the instant case, to hold the owner harmless from liens against the vessel. In fact, the charterer was required to give a bond conditioned to protect the claimant by reason of liens or other claims against the ship arising through or under the charterer. Yet this was not said to indicate that the charterer had authority to bind the vessel. The court decided that a lien would prevail because no notice of the terms of the charter-party was brought even constructively to the libelant.

And in *The Golden Rod,* 151 Fed. 6, the lien was not allowed, notwithstanding that the charterer had "engaged to furnish a bond to protect against any liens for seamen's wages, repairs, supplies, etc."

Finally, upon this proposition we submit that the particular provision of the charter-party from which the learned District Judge drew his inference, should be deemed to refer to such liens as those for seamen's wages, for which a vessel would be responsible irrespective of the agreements of the owner and charterer (*The Gen. J. A. Dumont,* 158 Fed. 312, 314).

Our fourth proposition we have already stated as follows:

IV.

EVEN IF IT COULD BE HELD THAT THE TERMS OF THE CHARTER-PARTY WHEN READ LITERALLY, FAIL TO DEPRIVE THE CHARTERER OF AUTHORITY TO BIND THE VESSEL, YET THE TERMS UPON WHICH THE VESSEL WAS IN FACT HELD, AS EVIDENCED BY MR. SOOY'S LETTER TO MILLS, THE CHARTERER'S AGENT, AND HIS ACQUIESCENCE AND THE ACQUIESCENCE OF THE CHARTERER, HIMSELF, THEREIN, DEPRIVED THE CHARTERER OF AUTHORITY TO BIND THE VESSEL; PARTICULARLY IN VIEW OF THE FACT THAT A CHARTER-PARTY MAY BE ORAL, AND THE FURTHER FACT THAT THE LIBELANT WAS NOTIFIED THAT THE VESSEL WAS UNDER CHARTER AND WOULD NOT BE LIABLE.

There is no doubt that Mills was the agent of Levick, the charterer. We submit his testimony on that point (particularly page 96 of Apostles).

> "Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the 'South Coast'?
>
> A. No. I did not. You mean in any capacity whatever?
>
> Q. In connection with the 'South Coast'?
>
> A. No, I did not."

There is no doubt that Mr. Sooy wrote the letter to Mills which is set forth in the record (pp. 78-79):—

> "June 26, 1915.
>
> Mr. E. A. Mills
> Pacific Wharf & Warehouse Co.
> East San Pedro, Cal.
>
> Dear Sir:
>
> Under the provisions of charter and option given by the South Coast Steamship Co., the owners of the S. S. South Coast, to Mr. Levick,

the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in some way injure Mr. Levick, and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am

Very truly yours,"

This is found as a fact by the court (p. 121 of Apostles).

There is no doubt that Mr. Sooy warned the libelant, as he testified, before any of the supplies here involved were delivered (pp. 72-73 of Apostles):—

"Q. Will you recount, please, the conversation you had with Mr. Rudbach on that occasion?

A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr.

Rudbach, 'You have furnished an order of goods here to the steamer South Coast'. He said, 'Yes, here they are'; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, 'Do you understand from Captain Roberts that the ship is not responsible for these bills?' He said, 'Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick'. I said, 'Captain Roberts is the President of the South Coast Steamship Company and I am Secretary and attorney for it, and Captain Roberts has just told me', and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, 'I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the "South Coast", and I have come here particularly to tell you that.'

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time.

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was Captain of the ship.

Q. Employed by whom?

A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage.

Rudbach disputes this; but the court believed Mr. Sooy and not Mr. Rudbach (Opinion p. 121 of Apostles).

> "He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship."

There is no doubt that Levick, the charterer, acquiesced in the letter which Mr. Sooy sent Mills (testimony of Mills, pp. 94-95 of Apostles):—

> "Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?
>
> A. Yes, that was several days after the boat had arrived.
>
> Q. Several days after?
>
> A. That was after Captain Roberts had told me the same thing.
>
> Q. Captain Roberts told you the same thing?
>
> A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills."

There is no doubt that the libelant had notice. The court found (p. 121 of Apostles):—

> "Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills."

There is no doubt that a charter-party may be oral.

The J. Doherty, 207 Fed. 997, 1001.

The H. C. Grady, 87 Fed. 232;

James v. Brophy, 71 Fed. 310.

Consequently, we submit that the terms upon which the vessel was held are not those delineated literally by the charter-party, but those which the parties believed and declared were the true facts of the case; as evidenced not alone by the formal charter-party, but by all of their writings and transactions.

Raymond v. Tyson, 17 How. 53;
James v. Brophy, 71 Fed. 310;
Barreda v. Silsbee, 21 How. 146.

And as we have frequently pointed out, the libelant cannot complain. He never saw the formal writing and he never sought to see it.

We respectfully submit that the decree should be reversed and the libel dismissed.

Dated, San Francisco,
February 28, 1917.

MARCEL E. CERF AND C. H. SOOY,
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